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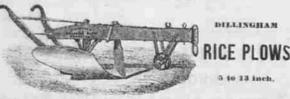
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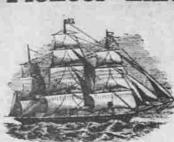
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WEDNESDAY, JULY 2, 1884.

upreme Court of the Hawniian Islands To the Honorable President of the Legislatic Assembly: Sin:-The Justices of the Supreme Court have received from the Legislative Assembly a resolution upon which their opinion was re-quested and now transmit through you their awer to the same. The resolution is as fol-

WHEREAS, there is a large number of men, women and children confined at Kalawao and Kakasko for having the leprosy, and as the fact of a person having said disease is not a crime nuder the laws or constitution; therefore be it Resolved, That this Honorable Legislative

seembly request the Judges of the Supremo court to state their legal opinion on the fol-1st. Is it a crime to be afflicted with leprosy that these people are confined at Kalawan and

2nd. Is not such confinement contrary to the

Constitution?

3rd. Is not the existing law relating to leprosy contrary to the Constitution?

The first question submitted is whether leprosy, the cause for which these people are detained at Molokai, is a crime. The preamble to the resolution concedes that leprosy is not a crime, and certainly it is not. It is a disease. There may be instances where a person having the disease of leprosy, willfully contaminates others or transmits it to his offspring or, being free from it, recklessly exposes himself to infection, and these may be called wrong or criminal acts, but unless these acts are prohibited by law they are not offenses or pun-

hibited by law they are not offenses or pun-ishable as such by law. The second and third questions may be tak-n and answered together, for if the law au-horizing the restraint of the lepers be in violation of the Constitution, then the restrain is itself illegal.

The fact that since the enactment of the law

segregating the lepers, some nineteen years ago, its constitutionality has not been tested by an application for a writ of Habeas Corpus, or otherwise, may be taken as a genera acquiescence by the community in the wisdom of the law. If such a course had been taken, the Supreme Court would then have had the advantage of argument from learned counsel on both sides of the question and the decision then made would have been much more sat-

isfactory.

It is presumed by us that the provisions of the Constitution which the mover of the resolution conceives to be violated by the Leprosy Act are Articles 6, 9, 11, 12, and 14. They "Article 6. No person shall be subject to unishment for any offense, except on due and

egal conviction thereof, in a court having jurion of the case. "Article 9. No person shall be compelled in any criminal case, to be a witness against him-solf; nor be deprived of life, liberty or prop-

self; nor be deprived of life, liberty or property without due process of law.

"Article 11. Involuntary servitude, except for crime, is forever prohibited in this Kingdom, whenever a slave shall enter Hawaiian Territory he shall be free.

Article 12. Every person has the right to be secure from all unreasonable searches and seizures of his person, his house, his papers and effects; and no warrants shall issue, but on probable cause, supported by oath or affirmation, and describing the place to be searched, and the persons or things to be seized.

"Article 14. Each member of society has a right to be protected by it, in the enjoyment of his life, liberty or property, according to law."

The preamble of the Act to prevent the spread of leprosy, is as follows:

WHEREAS, the disease of leprosy has spread to a considerable extent among the people, and the spread thereof has excited well grounded alarms; and whereas further some doubts have been expressed regarding the powers of the Board of Health in the premises, notwithstanding the 302nd Section of the Civil Code; and whereas in the opinion of this Assembly, the 302nd Section is properly applicable to the treatment of persons afflicted with the leprosy; yet for the greater

Annealed Fence Wire, Nos. 4, 5, 6, 7, and Staples, Galts Wash Bashins, Galt Garden Borderings and Nettings.

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Clothen Bankets, Hand Beakets, Work Baskets agent, may for the safety of the inhabitants, remove such sick or infected person to asperate bones, and provide for him with nurses and other necessaries, which shall be at the Charge of the person himself, his parents or master, if able, otherwise at the charge of the government.

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The Scale reconsidered such the lepting of the german of the public health of persons a sall be entitled to all the rights of the max Section 302 and line line interior of the person of the lumits of the public health, the same flee of the Civil Code.

The Sale and the public health is a subje stitutional provisions or fundamental prints.

ples, they cannot be successfully assailed in a ties of any office of profit or emolument under judicial tribunal.' In the same case, Judge the Government that he take the oath of allegiance which, as we have seen above, means that he astronalized. Miller says: "This power is and must be from its very nature incapable of any very exact definition or limitation. Upon it depends the social order, the life and health of the citizens, the comfort of an existence in a thickly population. ulated community, the enjoyment of private and social life and the beneficial use of prop-

> The Supreme Court of Verment, in 27 Ver. teports 149, says: "The police power of the state extends to the protection of the lives, State extends to the protection of the lives, limbs, health, comfort and quiet of all persons and the protection of all property within the State, and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health and pros-

concerned."

In 2 Kent's Commentaries, 340, the author says: "Unwholesome trades, slaughter houses, operations offensive to the senses, the deposit of powder, the spplication of steam power to propel cars, the building with combustible materials and the burial of the dead, may all be interdicted by law, in the midst of deuse masses and population, on the general and rational principle that every person ought to so use his private property as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community."

Judge Shaw, in a case reported in 7 Cush—

Judge Shaw, in a case reported in 7 Cush—

Judge Shaw, in a case reported in 7 Cushing, 85, says: "The police power is a power vested in the Legislature by the Constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and whotesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge for the good and welfare of the commonwealth, and of the subjects of the same."

The like authority is conferred on the Legislature by the Hawaiian Constitution in Article 48. "The Legislature has full authority from time to time to make all manner of wholesome laws not resugnant to the revisions."

me laws not repugnant to the provisions of he Constitution."

It has been truly said that self-preservation is the first law of nature. This is equally true

of a state. "Salus populi suprema est lex." The state has the authority inherent in itself to enact laws to secure the health, welfare and safety of the individual, and we have seen above that this authority is expressly conerred by the Constitution

In Dwarris on Statutes the police power of the state is called "the law of overruling necessity." No state could exist without it. If it did not exist in this Kingdom our population would be liable to be swept away by any and would be liable to be swept away by any and every contagious disease that might come to our shores and no measures of quarantine or restriction could be taken against it.

The Legislature, by the Act of 1865, in the exercise of its constitutional authority to make wholesome laws, were of the opinion that in order to secure the health and welfare of the community, all leprous persons who shall be deemed by competent authority, to be capable of spreading the disease, should be isolated and accluded.

It will be seen from a perusal of the whole

The Legislature of Hawaii acted upon this police power of the state when it enacted all the health laws of this Kingdom and these have existed since the foundation of the Government.

ships would cease to touch here, our products would fail to find a market abroad and these fair islands would become a pest house to be avoided by the whole civilized world.

A. FRANCIS JUDD. LAWRENCE MCCULLY. Brits, H. Austin. Honolulu, May 20th, 1884. the Han. President of the Legi

Sin:—On the 15th May, the Secretary of the Legislative Assembly transmitted to the Judges of the Supreme Court, for their opin-

Judges of the Supreme Court, for their opinion thereon, copies of two Resolutions, passed by your body. They are as follows:

1st. "Whenkas, there are employed as Secretary in the Foreign Office and Board of Health two Secretaries, Mr. Webb and Mr. Parker, who have not taken the cath of allegiance, and who are drawing pay from the Public Treasury: Therefore be it "Resolved that the Justices of the Supreme Court be requested to state their opinion whether the appointment and the drawing of pay by the two persons named is in accordance

whether the appointment and the drawing of pay by the two persons named is in accordance with the laws as they now exist."

2nd. "Resolved that the Justices of the Supreme Court be requested to express their opinion on the following question:

"Is it lawful for an alieu, to whom letters patent of denization have been conferred, to be appointed to an office of profit or emolument under the Government of this Kinsden. ander the Government of this Kingdom, with-out taking and subscribing the oath of allegiance in manner and form prescribed by Sec-tions 430 and 431 of the Civil Code!"

tions 430 and 431 of the Civil Code?"

The question raised by the first Resolution is whether an alien can legally fill the position of Secretary to the Minister of Foreign Affairs or of Secretary to the Board of Health.

Under the statute of 1846 aliens were not eligible to any civil or military office in this Kingdom, created by the laws. Vol. 1, Laws of 1845, p. 76. of 1846, p. 76.

This Act was repealed on the passage of the Civil Code in 1859 and, until 1876, aliens were eligible to office in this Kingdom except in the particular cases where the law limited the appointment to citizens, as for instance, Ministers to the King, or Governors, who must by Section 30 of the Civil Code be either "subjects all the right

Act to provide for the taking of the oath of allegiance by persons in the employ of the Hawaiian Government."

The preamble is as follows:
"WHENEAS, it is expedient that all persons who may be appointed to places of profit or emolument under the Hawaiian Government should take the oath of allegiance: Be it enacted by the King and the Legislative Assembly of the Hawaiian Islands, in the Legislature of the Kingdom Assembled;
"SECTION 1. From and after the passage of this Act every person who may be appointed to any office of profit or emolument under the Government of this Kingdom shall, before entering upon the duties of his office, take and subscribe the oath of allegiance in manner and subscribe the oath of allegiance in manner and form prescribed by Sections 430 and 431 of the Civil Code."

the Civil Code."

The second Section prescribes that on the failure of an office holder to take the oath within three months after the passage of this Act he shall be deemed to have resigned and his office shall become vacant.

This Act applied to all office holders, native born citizens as well as aliens, and this may have given rise to the opinion, which we understand is entertained by some, that the eath of alligiance here required, in an oath of office and not of naturalization.

Section 429 of the Civil Code authorized the Minister of Interior, on the application of an alien foreigner on the existence of certain re-quisites to administer the oath of allegiance to Section 430 reads as follows: "The oath o allegiance to be administered as aforesaid shall

and not of naturalization.

be as follows: LARD, in 5 & 10 lb. PAILS

Section 131 merely prescribes that the oath shall be subscribed by the person so naturalized, and sworn to in the form most obligatory upon his conscience and the jurat thereof is to be subscribed by the Minister of Interior or his Chief Clark

It is not to be presumed that a person would

be allowed to draw the pay of an office unless he undertook to perform its duties. We have no doubt that the law requires all persons of foreign birth, in order to enable them to hold offices of profit or emolument under the Hawaiian Government, to be naturalized, except in the instances hereinafi

It may be urged that the law is not mandatory but merely directory.

This Court has had occasion to consider State, and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the State. Of the perfect right of the Legislature to do this, no question ever was, or upon acknowledged general principles, ever can be made so far as natural persons are concerned."

In 2 Kent's Commentaries, 340, the author layer of the commentaries, state the court may find qualified for that purpose." We held that the law was imperative and mandatory to admit to practice none have: "Unwholesome trades, slaughter houses.

iance is a matter of convenience rather than

To illustrate what a directory statute is: "It has been held that where a statute specifies the time within which a public officer is to the time within which a public omcer is to perform an act regarding the rights and duties of others, it will be considered as directory merely, unless the nature of the act to be performed, or the language of the statute shows that the designation of the time was intended as a limitation of power." People vs. Allen, 6 Wendell 487; Jackson vs. Young 5 Cowan 250

Lord Mansfield's rule is that whether the statute is mandatory or not, depended upon whether the thing directed to be done was the essence of the thing required. Burrows, 447. The law now under discussion plainly requires, in our opinion, that the appointes to an office of profit under this Government shall not be a called.

whether any given employment under Gov-strament is or is not an "office of profit or conclument," would depend upon circum-stances. The office of Secretary of the Board stances. The office of Secretary of the Hoard of Health is created by law. See Chapter XI of the Laws of 1876, where the Board of Health "is authorized to employ a Secretary, medical practitioners and agents, who shall receive such compensation for their services as shall be approved by a majority of the Board at a regularly convened business meeting thereof, said compensation to be paid out of any funds available to the Board by legislative appropriation." lative appropriation."

We consider the position of Secretary to the Board of Health to be an office of profit or conclument under the Government and comes within

and seeluded.

It will be seen from a perusal of the whole act concerning leprosy that the Legislature regarded this disease as contagious or capable of being communicated to ether human beings. From the best information the Court can obtain, this is a characteristic of this disease. Upon this view of the disease, laws segregating lepers have been enacted in nearly all countries of the world.

The Legislature of Hawaii act. profit or emolument under the Hawaiian Gov-ernment, and that Chap. VIII of the Acts of 1876 above discussed, applies to the appointee

the health laws of this Kingdom and these have cristed since the foundation of the Government.

The Supreme Court in the Chinese Laundry case, 4 Haw. Rep. 335, decided that an Act forbidding the carrying on of the business of laundry keeping or washing for hire within certain limits in Honolula, was an exercise of the police power of the state with regard to the comfort, safety and welfare of society and was constitutional.

As at present advised we are of the epinion that the law authorizing the regregating and isolating of lepers, is not only a wholesome law and constitutional but that without spech a law the result would eventually be that much of our asseful population would leave these islands of the least of the present within the Kingdom, free from encumbrance, (4,) that he be not a refugee from the justice of some other country, (6,) that he be not a deserting sailor, marine, seldier or officer.

But it may be said that the Act of 1882 (Chap, XVIII) amending Sections 428 and 422 of the Civil Code, has so enlarged the requisites for naturalization as to make naturalization in many cases impossible. This Act requisites for naturalization as to make naturalization of the person wishing to be naturalized, (1,) the approval of the King, (2,) that he shall have resided within the Kingdom, free from encumbrance, (4,) that he be not a refugee from the justice of some other country, (6,) that he be not a deserting sailor, marine, seldier or officer.

admission to naturalization will be for the good of the country.

That the law is illiberal, considering that

That the law is illiberal, considering that this Kingdom desires population, and invites and encourages immigration, is manifest. But it is a sufficient answer to say that it is the law of this country at present.

This leads us to the discussion of the second resolution whether it is lawful to appoint an alien, upon whom Letters Patent of Dentration have been conferred, to an office of profit or emolument under the Government of this Kingdom, without taking the oath of allegiance.

this Kingdom, without saking allegiance.
Section 433, of the Civil Code is the entire authority for the conferring of Letters Patent of Denization. It reads as follows:

"It shall be competent for His Majesty to confer upon say alien resident abroad, or temporarily resident in this Kingdom, letters patent of denization, conferring upon such alien, without abjuration of allegamee, all therights, privileges, and immunities of a therights, privileges, and immunities of a alien, without abjuration of allegiance, all therights, privileges, and immunities of a native. Said letters patent shall render the denizen in all respects accountable to the laws of this Kingdom, and impose upon him the like fealty to the King, as if he had been naturalized as herein before provided."

It will be seen that a denizen is by the Letters Patent exceeds a colored with "all the letters are respected with "all the colored with "all the seen that a denize is by the letters patent exceeds a colored with "all the Lettera Patent expressly endowed with "all the rights, previleges and immunities" of a matter and this is precisely the language used as to the effect of naturalization. Letters of as to the effect of naturalization. Letters of denization have always been considered to be a substitute for the oath of allegiance by which as a special favor the privileges of Hawaiian citizenship are granted with-out prejudice to the status of the denizan as a citizen or subject of a foreign state. If they do not have this effect, and therefore dispenae with the necessity of taking the oath of allegiance it is difficult to see why they should be asked for or accepted.

As we have above seen, one of these rights or privilegen is that of appointment to public office without the necessity of taking the oath

We are of the opinion that Letters Patent of Denization from the King, conferring upon on alien, without objuration of allegiance all the rights, privileges and immunities of a native, place the receipient in the status of a subject, and it is therefore not requisit Section 30 of the Civil Color decisions. An Act was passed in 1874, (Chap. 42 of the Session Laws of that year,) entitled, "An Act to provide for the taking of the oath of dition of his holding an office of profit or emolutions has necessary to the authorities of this Kingdon of the authorities of this Kingdon or content and the content olument under this Government. Such was
the view of the authorities of this Kingdom
from early times. For the honored W. L. Lee,
the first Chief Justice of this Court, was a
denizen. His Letters Patent dated lat of
December, 1846, are in the archives of the
Court. Bespectfully submitted.

(Signed.) A. PRANCIS JUDD.

LAWBERGE MCCULLY.

A. FRANCIS JUDD.
LAWRENCE MCCULLY.
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